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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No.

OCEAN FREIGHT AND BROKERAGE CORPORATION,

Petitioner,

v.

STATES MARINE LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Ocean Freighting and Brokerage Corporation, by its attorneys, Clark, Ladner, Fortenbaugh & Young, Esquires, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on February 4, 1970.

OPINIONS BELOW.

The opinion of the Court of Appeals is to be found in the appendix to this petition. The findings of Fact and Conclusions of Law of the District Court are to be found at pages 264a to 266a of the Appendix below.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered February 4, 1970. The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. The Congress having failed to act in the 18 years since your Honorable Court, in *Halcyon Lines v. Haenn Ship. Corp.*, 342 U. S. 282 (1952), decided not to fashion a rule of contribution for non-collision maritime cases, with the result that there is an hiatus in the law pertaining to such cases, should not your Honorable Court reconsider the desirability of action by this Court to remedy the undesirable consequences of continuing Congressional inaction?

2. Did not the court below err in deciding that the Jones Act (46 U. S. C. § 688) insulates the employer of a seaman from liability over in contribution to another shipowner concurring in the fault which occasioned Jones Act liability?

3. Should not the judicial branch of this polity declare the rule of contribution in admiralty to be the divided-damage rule already applicable to collision and grounding cases, when the law of admiralty expressly recognizes the right to contribution?

STATUTE INVOLVED.

The Jones Act, March 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007, 46 U. S. C. § 688 which reads:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

STATEMENT OF THE CASE.

Domingo Mendez, a crew member of respondent's vessel, was drowned in Danang Harbor, Vietnam, in navigable waters, when the liberty launch provided by respondent[1] to afford him egress from his ship sank after colliding with petitioner's vessel.

The ensuing death action, in which the jurisdiction of the District Court was invoked under the Jones Act, Death on the High Seas Act (46 U. S. C. § 761) and the general maritime law, jointly naming petitioner and respondent as defendants, was settled before trial by petitioner. Thereafter, petitioner pursued its cross-claim (23a) against respondent for indemnity and/or contribution.

The final pre-trial order provided that the issue of respondent's liability be determined before resolution of the issue of the reasonableness of the settlement. After hearing the testimony on liability, the District Court, sitting without a jury, granted respondent's motion for dismissal under Rule 41(c) of the Federal Rules of Civil Procedure.

In essence, the District Court decided (264a-266a):

> 1. Both the launch and Petitioner's vessel were negligent; the decedent lost his life because of the negligence of both vessels;
>
> 2. Respondent owed a non-delegable duty to the decedent [to furnish him with safe transportation from ship to shore];
>
> 3. The negligent actions of the launch gave decedent a right of action against Respondent only;

---

1. A different launch served petitioner's vessel (41a, 132a). The Court of Appeals footnoted that there might have been but one launch service in Danang. The launch service was not joined in these proceedings.

4. Any breach of this duty did not inure to the benefit of Petitioner;

5. As between Petitioner and Respondent, the launch was an independent contractor, there being no right of direct control over the operation of the launch by Respondent;

6. Inferentially, Petitioner could not have indemnity in a "both-to-blame" situation;

7. Petitioner was not entitled to contribution because:

(a) there is no contribution in admiralty, except in collision cases;

(b) the breach of the duty owed decedent by Respondent was not within the collision exception to the general admiralty rule that there can be no contribution between joint tortfeasors.

Petitioner appealed, challenging only the Conclusion of Law of the District Court that petitioner could not have contribution. Respondent's cross-appeal challenged only those portions of the Findings of Fact holding the launch at fault.

The Court of Appeals for the Third Circuit affirmed the decision of the District Court, agreeing that petitioner was not entitled to contribution and thus did not reach the merits of respondent's appeal.

Hence, this Petition.

REASONS FOR GRANTING THE WRIT.

1. Since *Halcyon Lines v. Haenn Ship Corp.*, 342 U. S. 282 (1952) there has been no law of contribution in admiralty other than the already well established divided damage rule of collision cases. To be sure, there has been indemnity: *Marine Terminals v. Burnside Shipping Co.*, 394 U. S. 404 (1969). The lacuna has been more productive of perjury than justice. Sometimes, when the facts are so clear that not even perjury can prevail, there is high comedy so irremediable that a respected circuit judge has accurately described this area of the law as a "wonderland": *McLaughlin v. Trelleborgs Anfortygs A/B*, 408 F. 2d 1334 (per Judge Friendly at p. 1338). Perjury, injustice and comedy are not easily reconcilable with respect for the law and a decision nursing the same cries for reconsideration. Judge Freedman below has expressed the hope that *Halcyon* be reviewed (Appendix A5).

2. Your petitioner was rash enough to assume that, when its vessel collided with a launch transporting respondent's seaman-employee ashore, there had been a collision to which the collision-divided damage exception was applicable and confidently sought contribution to the settlement it had made with the seaman's estate.

The learned court below has declared a novel, but very important, interpretation of the Jones Act by deciding that, while respondent owed a duty to decedent's estate redressible in damages under the Jones Act (46 U. S. C. § 688), this duty was so peculiarly bred of the shipowner-seaman relationship that the shipowner's obligation did not "inure" to the benefit of outsiders (as the District Court has said) nor could it be "so twisted" as to support a contribution claim because the "Jones Act was not designed to extend shipowner's liability regarding other ship owners" (Opinion below, Appendix A3, A4).

Petitioner, as a shipowner itself, may agree that the Jones Act emphatically was designed to benefit the seaman-employee from the slightest slip of his employer. In this situation, vis-á-vis its own employees, it had hitherto been taught by courts and juries to regard itself as a tortfeasor. There is respectable authority that the Jones Act and its sibling, the F. E. L. A. (45 U. S. C. § 51 et seq.) did *not* design to create a special relationship between transportation employees and their employers but, rather, cast the employer more truly in the image of a tortfeasor by stripping him of the special common law defenses theretofore inherent in the employer-employee relationship: *2 Norris, The Law of Seamen*, 2nd ed., §§ 653-656. This being the case, to award freedom from contribution to respondent-tortfeasor, because it farmed out its non-delegable duty to an independent contractor, thus to avoid personal blame, is to suggest that any person similarly saddled by law with such a duty should be free of contribution. The example of the burden of the family car owner to contribute when not personally to blame for an accident should be sufficient to dispel any such illusion.

Nor should any thought of the difference in the legal source of the duty owed to the deceased seaman by the respondent and the petitioner affect their mutual duty of contribution. The great weight of authority is that contribution lies between a F. E. L. A. tortfeasor and a common law tortfeasor whose negligence combines to injure a railroad employee in, for example, a crossing accident: *Zontelli Bros. v. Nor. Pac. R. Co.*, 263 F. 2d 194 (8th Cir., 1959); *Chicago, Rock Island & Pac. R. Co. v. Chicago & N. W. R. Co.*, 280 F. 2d 110 (8th Cir. 1960), cert. den. 364 U. S. 931; *Cage v. N. Y. Central R. Co.*, 386 F. 2d 998 (3rd Cir. 1967). See also: *Patterson v. PRR*, 197 F. 2d 252 (2nd Cir. 1952—joint tortfeasors under F. E. L. A. and Federal Tort Claims Act). The cited cases hold that common liability to the injured

party—not concurrent negligence—is the touchstone of contribution.

It should make no difference, moreover, whether respondent's duty to decedent under the Jones Act be thought of as contractual rather than tortious. "The admiralty courts are civil law courts . . . [which have] . . . never experienced the agonies of the common law writ system and . . . never observed a sharp distinction between contractual and delictual rights. . . . Accordingly, in numerous instances already cited, contribution or division has been allowed in cases of breach of contract": *Oleck, Damages,* 1961 ed., § 331s p. 782.44.

3. *Halcyon,* in the case at bar, has been strictly construed to apply the collision exception only to collisions between vessels owned *and* operated by the joint tortfeasors themselves. It is strange that a decision not adverse to the concept of contribution—inviting legislative action, indeed, to mould the admiralty rule—should be so cautiously applied. It appears as though the lower court feared to wiggle its finger lest the dyke *Halcyon* raised for Congressional reclamation of the contribution field would collapse. But, of course, it is dangerous to tinker with superannuated coffer dams.

The divided-damage, maritime, contribution rule has its undoubted faults. It is arbitrary and inequitable. Your Court did well in *Halcyon* to scant it and hesitate to extend it to all contribution cases within the admiralty jurisdiction. Poor thing though it was, it was still the law and this Court decently observed its existence where well established in collision cases. The Congress did not accept your invitation to create a more equitable rule, with the unhappy result that, for 18 years, there has been *no* admiralty contribution rule outside the collision cases.

Had the decedent's estate proceeded to trial, and had the jury concluded (as did the District Court below) that

both vessels were to blame, a verdict would have been jointly rendered against petitioner and respondent. The estate then, in the absence of a contribution rule, could have executed in full against the respondent, who would have had no recourse against petitioner. Would respondent's plea for contribution have gone unheeded in such a case? Would not respondent with justification have bitterly protested the barbarity of the lawless area created by the inaction of the Congress? Your petitioner does so now.

Until the Congress otherwise enacts, it is respectfully submitted that your Honorable Court has the duty to declare the law of admiralty as to contribution between joint tortfeasors according to the customs and usages of the American seagoer, to wit, that damages be equally divided among the wrongdoers as has ever been the case where their mutual wrong resulted in a collision (*Halcyon, supra*) or a grounding (*White Oak Transp. Co. v. Boston, etc., Canal Co.*, 1922, 258 U. S. 341).

CONCLUSION.

WHEREFORE, Petitioner urges the grant of this petition, not just that justice be done in his case, but that the law may be more truly ascertainable in all cases such as his.

Respectfully submitted,

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Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 17995 and 17996

ARSENIA C. MENDEZ, ADMX. OF THE ESTATE OF DOMINGO MENDEZ, DECEASED,

v.

STATES MARINE LINES, INC.,
Appellant in No. 17995,

AND

OCEAN FREIGHTING AND BROKERAGE CORPORATION,
Appellant in No. 17996.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued December 19, 1969

Before McLAUGHLIN, FREEDMAN and ADAMS, *Circuit Judges*

OPINION OF THE COURT

(Filed February 4, 1970)

By McLAUGHLIN, *Circuit Judge.*

This was originally a damage action brought by the administratrix of the estate of Domingo Mendez, a seaman

drowned in a ship accident in Danang Harbor, Vietnam, while in the employ of appellee, States Marine Lines. Both States Marine and appellant, Ocean Freighting and Brokerage Corporation, were named defendants. However, prior to trial, Ocean Freighting entered into a settlement with the estate. Ocean Freighting is here appealing an order of the district court dismissing its contribution claim against States Marine.

The factual framework in which the controlling issue arises can be briefly outlined. Mendez, while a crewman on a States Marine vessel, boarded a launch (not owned or operated by States Marine though engaged by it) for transport to the shore. In route, the launch collided with an Ocean Freighting vessel, and Mendez drowned. The court below found that both the Ocean Freighting vessel and the launch were negligent (264a). From that arises the Ocean Freighting contention that it should receive contribution on the basis of the "admiralty divided damage—collision rule." States Marine not only opposes the application of this rule to the factual situation, but in its cross-appeal urges that the court below was "clearly erroneous" in finding fault on the part of the launch in that the record does not support such a finding.—Because we affirm the decision below agreeing that Ocean Freighting is not entitled to contribution, we need not consider the merits of appellee's protective cross-appeal.

The controlling issue is simply whether or not the maritime collision-contribution rule is relevant to the facts of this case. Of course, it is well-settled that in *non-collision* maritime torts, there is no contribution between joint tortfeasors. Halcyon Lines v. Haenn Ship Corp., 342 U. S. 282 (1952).

Turning to the facts, it is undisputed that the death of Mendez resulted from the collision of the launch and the Ocean Freighting vessel. To repeat, the court below found

both the vessel and launch at fault. Since the launch was, admittedly, not owned by States Marine and since we are in accord with the ruling of the trial court that it was operated by its owner as an independent contractor,[1] it seems clear to us that the launch owner and not the owner of the vessel it was servicing would be the proper party from whom Ocean Freighting might seek contribution.

Appellant in its contention that the particular launch service was an agent of States Marine and thus, the launch's negligence is attributable to States Marine further argues that States Marine's Jones Act (48 U. S. C. § 688) obligations to Mendez (or his estate) imposes liability upon States Marine for its contribution claim. With respect to the liability stemming out of agency principles theory, the court below in determining that the launch was an independent contractor, held that "There was no right of direct control over the operation of the motor launch by * * * (States Marine)." (265a) We see no reason to disturb these conclusions.

The court also decided that with respect to Mendez, the launch's negligence would be attributed to States Marine. Certainly this is correct for it is elemental that Mendez' employer was obligated to insure Mendez safe means of ingress and egress from his ship. But it does not follow that the liability imposed upon employer States Marine by the Jones Act vis á vis seaman Mendez can be so twisted as to support Ocean Freighting's contribution claim. The Jones Act was enacted for the benefit of seamen. Mr. Justice Stone stated this clearly in The Arizona v. Anelich, 298 U. S. 110, 123 (1936):

"* * * [W]ith respect to the modified and in some respects enlarged liability imported into the maritime

1. The launch service in question, probably the only such service in Danang Harbor, evidently served all of the harbor's vessels. (213a).

> law by the Jones Act * * * the legislation was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection * * *. Its provisions * * * are to be liberally construed to attain that end * * *." (Citations omitted.)

The Jones Act was *not* designed to extend ship owner's liability regarding other ship owners. Appellant's argument that States Marine's Jones Act obligations to Mendez creates contribution liability in States Marine to Ocean Freighting is completely without merit. We are satisfied the district court was entirely correct in its determination that under the circumstances of this appeal "* * * there is no basis for applying the collision exception to the contribution rule in admiralty." (266a). State Marine's vessel on which Mendez was a crew member was not involved in a collision with appellant's vessel. In Halcyon Lines, supra, the Supreme Court made it clear that any enlargement of the collision contribution rule in admiralty must come from the Congress. A recent comment by Judge Friendly of the Second Circuit in McLaughlin v. Trelleborgs Anfartygs A/B, 408 F. 2d 1334, 1338, cert. den. 395 U. S. 946 (1969) is sound in stating that unless Congres acts,

> "So long as Halcyon v. Haenn, * * * 342 U. S. 282, * * * remains on the books, inferior federal courts will do better to abstain from further adventures in this wonderland and leave doctrinal development to the Supreme Court * * *."

The judgment of the District Court will be affirmed.

FREEDMAN, *Circuit Judge,* Concurring.

It is ironic that admiralty, normally so hospitable to equitable principles, should deny contribution except in a strictly limited category of "collision" cases. But this is the doctrine of Halcyon Lines v. Haenn Ship Corp., 342 U. S. 282 (1952).

Halcyon might be interpreted not to bar relief here, since a collision did in fact occur, albeit States Marine Lines had delegated to an independent contractor its duty of transporting its seamen to shore. But the construction the case has received warns against our expansion of its doctrine (see McLaughlin v. Trelleborgs Anfartygs A/B, 408 F. 2d 1334, 1338 (2 Cir.), cert. denied 395 U. S. 946 (1969)) and leads me to the conclusion that we should not permit contribution in a case which seems to go beyond the factual circumstances marked out in *Halcyon.*

Therefore, while joining in the conclusion of the court, I express the hope that there may be review and with it a reexamination of the existing limitation on contribution in admiralty.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.